EQUITY CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF
NORTH-CAROLINA.

At June Term, 1827.

Susannah Bryan by her next friend
v.
Henry Bryan & John Sellers adm'r. of Josiah & Easter Blackman. } From Johnston.

Where land was sold for partition under the act of 1812, and the share of a feme covert paid to her husband, a Court of Equity will decree her an indemnity against him.

Under such a sale, the share of a minor, not being vested according to the act, a Court of Equity will follow the property, and decree it to an heir against the administrator.

A feme covert being thus entitled, it was held that she could, by her next friend, maintain an adversary suit against the administrator and her husband, and that the fund was not liable for the debts of the latter, either to the administrator or to the intestate.

In this State, no settlement being made on the marriage, the wife has no equity against her husband, he being insolvent, for a provision out of her choses accruing during the coverture.

The allegations of the bill were, that the Plaintiff married the Defendant *Bryan*, in the year 1816; that she brought him a large property in slaves and money; that

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after the marriage, real property descended upon the Plaintiff as one of the heirs of her mother, which was sold under an order of the Court of Equity for the county of Johnston, for the purpose of partition; that the Plaintiff's share of the proceeds was received by the Defendant *Bryan*, her husband, who had appropriated it to his own use. That no settlement had ever been made upon the Plaintiff by her husband, who had become entirely insolvent. That *Josiah* and *Easter Blackman*, a brother and sister of the Plaintiff, had recently died intestate, and within age, leaving the Plaintiff and three others their next of kin and heirs at law. That the property of *Josiah* and *Easter* consisted of their respective shares of the real estate, sold under the order above mentioned, and a balance of cash due by their guardian; and that administration upon the estates of *Josiah* and *Easter* had been committed to the Defendant *Sellers*, who had received their portion of the proceeds of the real estate, as if it was personalty.

The prayer of the bill was for general relief, and that the Defendant *Sellers* might be enjoined from paying over the surplus in his hands to the Defendant *Bryan*, and that it might be secured according to the settled course of the Court, for the sole and separate use of the Plaintiff.

The answer of *Sellers* distinctly admitted all the above facts; but averred first, that the Defendant *Bryan* was the guardian of his intestates, and owed their estates a large balance, for the recovery of which, he being insolvent, proceedings had been instituted against his sureties. Secondly, that *Bryan* owed him, *Sellers*, individually, and he contended that the residue in his hands, claimed by the Plaintiff, was subject to the satisfaction of one or both of both of these debts.

The answer of *Bryan* was not read at the hearing, and did not at all vary the case.

Devereux, for the Plaintiff.

1. The wife is clearly entitled to the proceeds of the real estate. By the express provisions of our law, this descends as realty: over this therefore, the husband has no control. (*Act of* 1812, *Rev. c.* 847.) Being thus entitled, and having no mode pointed out by law whereby she can avail herself of this right, this Court will aid her, and secure it to her separate use. (*Wynne & wife* v. *Tunstal*, *ante* 23.)

2. The wife has, in this Court, a well settled equity against her husband, for a separate maintenance out of her choses in action, particularly when the husband is insolvent. It is recognized as existing against the husband personally, and to deny her the privilege by her next friend, of enforcing this equity, is to give her a right, and deprive her of a remedy.

3. The debt which the husband owes to *Sellers*, does not affect the equity of the wife; neither is it affected by the fact that he owes the estates of the deceased brother and sister. (*Elibank* v. *Montolieu*, 5 *Ves.* 737,—*Carr* v. *Taylor*, 10 *Ves.* 574.) This follows as a necessary consequence from the fact, that the equity of the wife cannot be affected by the assignment of the husband. The same authorities are full to the point, that the wife may, by her next friend, institute an adversary suit against her husband.

4. It appears from the pleadings, that the husband owes a legal debt to the wife—he having received and converted to his use her share of the proceeds arising from the sale of real estate descended from her mother. If all the other grounds upon which her case is founded, fail, this must avail her. It is admitted as a general rule, that this Court will not entertain a bill seeking to subject the debts of another to the satisfaction of his creditors, until the claim has been established at law. But as the law

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gives the Plaintiff in the present case no means of establishing her demand, this rule must be dispensed with.

Badger, for the Defendant *Sellers*.—It is admitted, that in England, the claim of the Plaintiff would be irresistible, and that she might there assert it in the manner in which it is now sought to be enforced.

1. But this equity of the wife, is founded upon the very artificial state of society existing in England. There is nothing similar to it in our country. It is repugnant to the genius of our institutions, and to the manners and habits of our people. It tends to create a distinct interest between husband and wife, which is destructive of the end of the marriage state, as to property. This view of the case is strengthened by the fact, that this is the first attempt to enforce this equity in our Courts, although they have now been established nearly a century, and it is a principle which is familiar to the whole profession.

2. This rule of the English Courts of Equity ought not to be adopted with us, because our statute of distributions gives the wife an indefeasible interest in the personal estate of the husband. It is, in England, founded upon the notion, that it is hard, unjust, and contrary to natural equity, to permit the property of the wife to swell a fund, from which the caprice of the husband may cut her off. With us, nothing but the insolvency of the husband can prevent his wife from receiving a share of his estate. The law makes her equally the partaker of his prosperity and of his adversity.

3. As to the claim of the Plaintiff as a creditor of her husband, so far as respects the receipt of her real assets; it can only be redressed by an application to the Court under whose order the land was sold, and by a motion in the cause where the sale was ordered, to secure to her, her share. It does not form a ground for a distinct suit in this Court.

Devereux, in reply.—The manners and customs of our country, as well as our laws, being derived from England, it is fair to presume, that those principles which have been sanctioned by the experience of ages there will be found applicable to us; especially when we consider the great and increasing intercourse between the two countries, and that we are pursuing the same career in trade, and the acquisition of wealth. This principle of the English Court of Equity has been adopted in several of the States. *Howard* v. *Moffatt* (2 *John. Ch. R.* 206) *Gleun* v. *Fisher* (6 *do.* 33) *Dumond* v. *M'Gee* (4 *do.* 318) *Kenny* v. *Udall* (5 *do.* 464) *Haviland* v. *Myers* (6 *do.* 225) *Haviland* v. *Bloom* (6 *do.* 25 & 178) *Ex parte Beresford* (1 *Dessaus Ch. Rep.* 263).

The fact, that by our law, the wife has a certain interest in the personal property of the husband, cannot affect her. Our statute is but little more than a copy of the customs of the city of London, and the province of York, yet in all the English books, no case can be found, exempting the husbands bound by those customs, from the rule contended for. Our act of 1784 (*Rev. c.* 204, *s.* 8) gives the wife dower only in the lands of which the husband *died seised*—whereas the common law gave her much more extensive rights. It may be doubted whether the wife is better provided for under our laws, than under those of England.

TAYLOR, Chief-Justice.—This is a bill filed by a married woman against her husband, and the administrator of her deceased brother and sister, seeking to enjoin the latter from paying over to her husband the Complainant's right to distributive shares which have been received by the administrator; and praying, in consideration of her having brought a considerable fortune to her husband, who is now insolvent, that the said shares may be settled to the separate use of herself and children, and secured from the claims of her husband and his creditors.

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Part of the sum claimed by the Complainant, is derived from the sale of the real estate of her deceased brother and sister, who were minors at their respective deaths, which sale was made for the purpose of partition, but the Court of Equity directing the partition, omitted to settle the proceeds, so as to secure them to their real representatives. The residue of the sum claimed by the Complainant, is the produce of the personal estate.

As the sum raised by the sale of the real estate is considered as land, and is payable to those who would have been entitled to the inheritance, I am of opinion that the wife has an equity for a separate settlement of that sum upon her; and although the act makes it the duty of the Court ordering the partition to secure it to the real representatives, yet the right of the wife cannot be prejudiced by the omission. If there was any doubt of the fact, the Court ought not to proceed without further enquiry, but it is distinctly admitted by the answer. This bill therefore, as to this part of it, may be considered as a bill to carry the former decree into execution; in which case, the Court will vary the decree where the mistake is evident, (*Mitford* 75) and will also correct it on motion. *Newhouse* v. *Mitford* (12 *Ves.* 456).

With respect to the claim of the administrator to retain the sum due him, out of the money thus accruing to the wife, I think it cannot be supported. The administrator is trustee for the next of kin, of whom the Complainant is one. As she has a clear equity against her husband, as to this money, that must operate to bar any right of retainer he can set up to the property of which he became administrator; and in *Carr* v. *Taylor* (10. *Ves.* 574) it was decided, that altough the husband was indebted to the estate of the person under whom the wife claimed the property, yet the administratrix of such person could not set off the debt against the wife's title by survivorship to the fund; for the property being a share of a residue, the Court said it could not be sued

for but in the joint names of husband and wife, and that if he had died without reducing it into possession, it would have survived to her, and consequently free from the husband's debts.

The Complainant's claim to the produce of the personal estate, cannot I think be supported. When a settlement has been made on the marriage, but an inadequate one, and property accrues to the wife afterwards, in the nature of an equitable right, the Court will sustain a similar claim in behalf of the wife against the husband, and in many instances against creditors. The equitable right which a married woman has, in a Court of Equity, to a provision out of her own fortune, before the husband reduces it into possession, stands upon the peculiar doctrine of the British Courts of Equity, is almost always connected with the enquiry as to settlement, and is the result of a state of society highly artificial.

But even there it is uniformly held, that where the husband can come at the estate of his wife without the aid of a Court of Equity, the Court cannot interfere. Our law has made an alteration in favor of the widow, with respect to personal property, so material as to render questionable that equity for a settlement as against her husband, which is so well settled in the British Courts. I will not deny, that there may be cases where an application of this kind may be proper here, as where the husband will not maintain his wife, and is likely to possess himself of a legacy or distributive share coming to her. But where they live together, and make a joint effort for the maintenance of the children, I should doubt the propriety of extending further the notion of separate interest. It may be a hardship for a married woman who brings a fortune to her husband, to find herself and her children reduced to poverty; but she knew when she married him, that the law gave him an absolute property in all her personal estate capable of immediate possession,

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and in all she should afterwards acquire, if reduced by him into possession during coverture. The hardship might have been guarded against by a settlement, and the not making one, is an evidence that she agreed to share his fortune, be it prosperous or adverse.

The wives and children of his creditors may come to poverty by not receiving their debts, contracted upon the faith of property apparently belonging to him.

I am unapprized of any decision in this State, extending the practice further than requiring the husband to make a reasonable provision for his wife, where the aid of this Court is necessary to enable him to take possession of her property; and exacting the same provision from his legal representatives or assignees, where they are obliged to come here to establish a claim which accrued to the husband in right of his wife.

PER CURIAM. Direct an account of the assets of *Josiah* and *Easter Blackman*, and directs the Clerk to distinguish the amount of real assets which have come to the hands of *Sellers*. Direct also an account of the proceeds of the real estate of the Plaintiff, which came to the hands of the Defendant *Bryan*, and retain the cause for further directions.

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Ashmon T. Collier & Elizabeth his wife
v.
Hasten Poe. } From Chatham

The statute of limitations does not apply as between bailor and bailee, and the latter cannot, by denying the bailment and claiming against the bailor, make his possession adverse.

Where a father, upon his daughter's marriage, before 1806, sent home property with her, it was presumed to be a gift as between the parties, and should be taken as such in favor of creditors.

But a declaration to the daughter accompanying the delivery, that a loan and not a gift was intended, is sufficient to rebut the presumption, and convert the husband into the father's bailee, although such declaration was unknown to the husband.

The bill was filed in February, 1824, and set forth, that the Defendant in 1804, intermarried with a daughter of one *James Paine*, who, within a week after the marriage, put into his possession several negro slaves, expressly declaring at the time in the presence of the Defendant and of his wife, that he did not intend the negroes as a gift but merely lent them during his pleasure —that the wife of Defendant had issue the Plaintiff *Elizabeth*, and immediately thereafter died,—that *Paine* died about the 4th of December, 1807, having first made his will, and bequeathed the negroes to the Defendant for eighteen years, and then directed them to be divided between the Plaintiff *Elizabeth* and the Defendant—the moiety of the Defendant to be retained by him during his life, and after his death, to vest in her. The bill then set forth the marriage had between the Plaintiffs, and charged that the Defendant had denied their title, had sold some of the slaves, had threatened to sell others—that he was possessed of but little property, and the Plaintiffs believed would remove all the negroes beyond the state. The Plaintiffs prayed a special writ directing the Sheriff to seize the negroes and retain them 'till surety should be given to prevent such removal, and to produce them when required by the Court, and for an account and general relief.

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The answer denied the loan, and insisted upon the delivery of the negroes as an advancement to the Defendant's wife, and alleged that the Defendant had always held and claimed the negroes as his own property, that when some report was circulated of the claim now set up by the Plaintiffs, he had openly and publicly announced his title—had for more than three years before the death of *Paine*, and ever since exclusive, continued and adverse possession of the slaves, and insisted on the statute of limitations.

By the proofs it appeared, that when the negroes were about being sent to the house of the Defendant by *Paine*, he did declare to his daughter, that they were lent during his pleasure, and were not designed as a gift, but it did not appear that the Defendant was present. And it was also in proof that the Defendant always claimed title to the negroes, that he made it known, and held them as his own, in opposition to the title now set up.

The cause was submitted without argument, by *Murphey & Nash*, for the Plaintiffs, and *Gaston*, for the Defendant.

HENDERSON, Judge.—It has long been settled by the decisions of our Courts, that if a parent puts property into the possession of a child who has left, or is about to leave the parent, such property is presumed to be given, and not loaned to the child, and therefore purchasers and creditors have subjected it to their claims, whatever may have been the private understanding of the parties. *But this is a presumption of fact, and not of law.* Clearly, therefore, between the parties, and all others, who cannot impute either legal or actual fraud to the transaction, the true character of the act may be shewn. In this case, (the contest being between the parties) it appears very satisfactorily from the testimony, that the slaves were

loaned, and not given, they therefore remained the property of the wife's father, and subject to his dispositions.

The Defendant must therefore account for the hire and profits of the slaves, from the period his interest in them ceased, to wit, 18 years after the death of his wife's father: and as it also appears, from the Defendant's answer, that he has sold more than one-half of the slaves, those remaining in his possession must forthwith be delivered to the Complainants. As to the statute of limitations, relied on in the answer, there is no pretence for its *operation*, either in law or equity. The possession of the Defendant was that of a mere bailee; notwithstanding his declarations that he claimed them as his own, he could not, by his own act, throw off his character of bailee. In ascertaining the character in which he received and held the negroes, it is not material that he should have been informed that the slaves were loaned, and not given, for he came to the possession *as husband*, the loan being made to the wife, at least she was the meritorious cause of it, and she had full knowledge.—The Defendant must also pay the costs; for although the bill was filed before the expiration of the eighteen years, yet Complainants had just grounds to apprehend a farther waste of the property from the previous conduct of the Defendant, admitted by his answer.

PER CURIAM.—Decree accordingly.

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Nathan Ivy, and Polly his wife.
v.
Aaron Rogers adm'r. of Sarah Rogers, } From Wake.

Although lapse of time is no bar to an express trust, yet payment or other satisfaction, may be presumed from it.

Where an administrator, two years after his qualification, made a return to the County Court, admitting a balance against him, a bill filed twenty years afterwards by the next of kin, for that balance, without accounting for the delay, is too late.

It seems that the return alters the relation between the administrator and the next of kin, and divests the former of his character of trustee.

This was a bill filed in the Court of Equity, on the 15th of September, 1823, for an account and distribution of the estate of the Defendant's intestate. The bill only set out the Plaintiffs title, which was not disputed, and concluded with the usual prayer.

The Defendant, in his answer, stated that his intestate died, and administration was committed to him in the year 1800, that two years thereafter, he had, pursuant to an order for that purpose, returned his account to the Court, which exhibited the sum of $28 45, due each of the next of kin—averred that he had paid the Plaintiff *Polly* the amount due her before her intermarriage with the Plaintiff *Nathan*, and insisted upon the lapse of time as a protection.

There was some evidence taken and read at the hearing, but its recapitulation is not necessary to the elucidation of the case.

Devereux, for the Plaintiff, referred to *Falls* v. *Torrance* (2 *Hawks*, 490—4 *do.* 412.)

W. H. Haywood, contra.

Taylor, Chief-Justice.—The equity of this case depends upon the question, whether satisfaction of the sum demanded in the bill ought to be presumed, on the ordinary principles on which this Court proceeds. In 1802

the Defendant settled his administration accounts, in which he charged himself with a balance due the distributees. This settlement was made under the authority of the County Court, in the customary mode; and if no higher effect can be ascribed to it, as an *ex parte* proceeding, it possessed at least, this quality, of enabling all the parties concerned in interest, to ascertain the sum acknowledged to be respectively due them, to enforce the payment, if they were satisfied with the correctness of the accounts, or to open them, if they were dissatisfied.

In 1823, more than twenty years afterwards, this bill is filed, without showing any reasons for the delay, and containing only on that point, the general and formal allegation, that the Defendant had failed to account after being requested to do so.

Now had a bond been executed to the Complainants for their individual share, and no interest paid within the time, the presumption of payment would have arisen at law, and been effectual to prevent a recovery, unless it could be repelled by some of those circumstances, which are usually relied upon for that purpose; such as insolvency or near relationship, or the absence of the party entitled to the money.

Though this case is purely of equitable jurisdiction, and not subject to any legal bar, by force of the statute of limitations, yet this Court has from an early period adopted rules as to barring an equity, drawn as nearly as possible from analogy to the rules of law. Thus a mortgagor coming to redeem after twenty years possession by the mortgagee, without showing some act, in which it was treated as a mortgage within that period, is too late. The principles of all these decisions has been affirmed and sanctioned by an act of the last Legislature, by which the presumption arises within ten years. (*Acts of* 1826, *c.* 28).

In a case marked with the circumstances presented here, the Court will presume satisfaction, and throw

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the *onus probandi* upon the distributee, who ought to satisfy the Court that the presumption cannot take place, otherwise the greatest mischief may be apprehended from parties being called on to account at a remote period, when according to the course of human affairs, their vouchers may be lost, or their witnesses may be dead.

The presumption of payment is materially strengthened, when a sum of money is acknowledged to be due to a particular person, the payment of which may be enforced at his will; for as a man must be supposed to be always ready to enjoy what is his own, proceedings would have been sooner instituted, had the money not been paid. Where the Defendant can discharge himself only by a payment of the money into Court, the presumption is impaired in its strength, *Hervy* v. *Dinwiddy* (2 *Ves. jr.* 90).

The only demand of this money proved in this case, was made about the time of filing the bill; but I do not conceive it would have varied the principle of the decision, if an earlier demand had been shewn, for the mere demand of a debt without process, or any acknowledgment, is not sufficient to take a case out of the statute of limitations; nor, as I apprehend, would a demand without process, repel the presumption from the lapse of time. (*Oswald* v. *Leigh*, 1 *Term Rep.* 272.)

With respect to the answer made to the loss of remedy from the lapse of time, that the Defendant is a trustee, and therefore cannot avail himself of this defence.—I deem it unnecessary to examine the doctrine relative to express and implied trust, because the settlement of account by the administrator presents a clear ground of decision, whatever the Defendant's original character may have been. From that time the trust ceased to be open, and the Defendant stood in a new relation to the Complainant as his debtor. Could the Complainant have sued at law, his cause of action would there have accrued, and the statute would have begun to run from

that time. Certainly then, the Defendant may rely upon the lapse of time in this Court.

This does not however, appear to be a case wherein the Defendant is entitled to costs, for though the bill should be dismissed upon the general presumption of payment, which is raised in these cases, where there are no means of creating beliefs or disbeliefs, yet the Defendant's allegation of the fact is vague and unsatisfactory. He only states that he has long since paid the Complainant, before her intermarriage. It is neither specific as to time, place, or attending circumstances, which would render it impossible to be met by counter evidence. The rest of the answer as to the fact of payment, is argumentative.

PER CURIAM.—Bill dismissed without costs.

Hillary Hooks & Mary his wife,
v.
John Sellers & Wm. Ashford, adm'rs of Josiah Blackman,
} From Wayne.

Exceptions to a report upon a reference to take an account, are unnecessary when the Master assigns unsatisfactory reasons for his conclusions.

It seems, that a bill to correct errors in an account, is, in its nature an exception, and to a report on such a bill stating a new account, none need be filed.

The bill which was filed in August, 1819, charged, that *Josiah Blackman*, was the guardian of the Plaintiff *Mary*, and received of her property a large sum; that he died intestate, and that administration on his estate was committed to one *William Blackman*; that after the intermarriage of the Plaintiffs, to-wit, on the 10th of June, 1816, the Plaintiff *Hillary*, and *William Blackman*, came to a settlement of the guardian accounts of the intestate, and that a balance was found to be due the Plain-

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tiff; that in taking the account error was committed, in not charging the intestate with the hire of the negroes and the rent of the land belonging to the ward, for the years 1799, 1800 and 1801; that *William Blackman* died intestate, and that administration *de bonis non*, of *Josiah Blackman* had been committed to the Defendants. The prayer of the bill was for general relief, and that the Defendants might by the decree, be compelled to pay the Plaintiffs the sum due them by reason of the errors.

The Defendants, in their answer, admitted all the facts charged in the bill, except the existence of the errors as specified, of which they put the Plaintiffs to strict proof.

Upon a reference to the Master, he reported that the errors charged in the bill did exist, and that the sum of $1274,53 was due the Plaintiffs, from the estate of the guardian. The only evidence reported by the Master was, an account produced by the Plaintiff *Hillary*, and by him sworn to be the one used by *William Blackman*, on the settlement in June, 1816, from which the items of hire and rent for the years 1799, 1800 and 1801, after being inserted were erased; a book proved to be in the handwriting of *Josiah Blackman*, with an entry on the first page, that it was "a book to keep the hire of negroes belonging to the orphans of *William Fellow*, deceased," (the father of the Plaintiff *Mary*) in which the hire and rent for the above-mentioned three years was entered without remark, and every other entry in it, relating to the property of the Plaintiff, was incorporated into the account. Also the deposition of one *Elliot*, who swore that he had been called on as an arbitrator to settle between the Plaintiffs and *William Blackman*, as administrator of *Josiah*, that a former account was produced, in which the rent and hire for the above-mentioned three years was erased, and that the arbitrators seeing no reason why those erasures were made, had taken the several items into the account.

Upon the coming in of the report, his honor Judge RUFFIN pronounced a decree of confirmation, and awarded execution. The Defendant not having an opportunity of appealing, brought the cause to this Court by *Certiorari*.

Although the decree below recited that exceptions were filed, they probably were not reduced to writing, none appeared upon the transcript.

In this Court, *Badger* for the Plaintiffs, insisted that the report not being excepted to, must of course stand.

Gaston, contra, contended, that none were necessary, as the evidence reported plainly did not justify the Master in his conclusion.

HENDERSON, Judge.—I can see no grounds upon which the report of the Master can be sustained. That no cause is assigned, why items originally inserted in an account, were obliterated, is certainly a very insufficient reason for reinstating them, in the absence of all evidence to prove the propriety, of originally inserting them.

As to the objection that the report was not excepted to in the Court below, we cannot shut our eyes to the unsatisfactory reasons assigned by the Master. In such a case exceptions are unnecessary; they would only point out that which is sufficiently obvious. Besides, this being a bill to surcharge and falsify, it is, in its very nature, an exception as to the items complained of, and in the laxity of practice, as yet allowed in this State, in a report like the present, we will look into it without formal exceptions. The decree must be revised, and the cause remanded.

PER CURIAM.—Decree reversed, and the cause remanded.

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Richard Kennon & wife & others, next of kin to Abraham Harper,*
v.
Henry Branson and Tho's. Ragland, adm'rs of said Harper.
} From Chatham.

The jurisdiction of the County Courts as Courts of Equity, being confined to suits for distribution, they have no power to make any order in such suits, which is not necessary to a correct decision.

Therefore, in a petition for distribution, where the administrator and the intestate had been copartners, and upon a reference of the partnership and administration accounts, a balance was reported against the estate—it was held, that this only formed a *defence* against the suit—and that a decree against the next of kin for such balance was erroneous.

Whether a Court of general Equity jurisdiction can decree the Plaintiff to pay a balance against him—*Quere?*

This was a petition in Equity filed in the County Court, at May term, 1816, in the common form, praying that the Defendants, administrators of *Abraham Harper*, might render an account of their administrationship, and make distribution. Owing to the destruction of the Clerk's office by fire, the transcript was very defective, and nothing appeared of the cause, except the original petition, the subpœna and the return thereon, until the Fall term of the Superior Court in 1824, when a report made before that time was set aside, and the cause referred to the Clerk "to take all the accounts of the Defendants, as administrators of *Abraham Harper*, and also of the said *Harper* with either of the Defendants," with leave to examine the parties upon interrogatories; ac-

* The Reporters have entertained doubts whether suits of this kind in their clasification, belong most properly to the Law or Equity cases—the forum being strictly legal, but the subject matter and the form of proceeding purely equitable.

companied by an order that all the books and papers relating to the accounts, should be filed with the Clerk. At Spring term, 1825, the Clerk made a report, wherein he stated, that under the order of reference, he had first proceeded to take the accounts of *A. Harper & Company*, which was composed of the intestate, the Defendant *Branson* and one *Samuel Allen*. Secondly, the accounts of a copartnership composed of the intestate and the Defendant *Branson*. Thirdly, the private accounts between the intestate and *Branson*; and fourthly, the administration account of the Defendants. The general result of all which was, a balance of $6235,62, due the Defendant *Branson*.

Many exceptions to this account were filed, which are not noticed, as the case was not decided upon them.—His honor Judge NORWOOD, on his last circuit, decreed, "that the Defendant *Henry Branson* recover of the petitioners $6235,62, of which sum it is adjudged and decreed, &c." specifying the amount to be paid by each petitioner. From which decree, the latter appealed.

The *Attorney-General* and *Gaston* for the Appellants, were stopped by the Court, and upon an intimation from the Bench, of a decided opinion against the Defendants, *Nash, Badger* and *W. H. Haywood*, for them, declined arguing the cause.

HENDERSON, Judge.—Had the Plaintiffs resorted to a Court of Equity to recover their distributive shares, I doubt very much whether a decree could be made against them, or even against the property of the intestate in their hands, for any balance which might be due to the Defendant, upon taking an account of transactions between him and the intestate, they having stood in a relation to each other which subjected them to an account. But be that as it may, I think that the Courts of Law, in cases of petitions for filial portions and distributive

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shares, being in this respect, Courts of limited jurisdiction, have no such power. It is true, that if an account between the parties is necessary to sustain either the charge, or the defence, *quoad hoc*, the Court has jurisdiction, but no further. In the present case, if an account of the different partnerships in which the intestate was concerned, was necessary, either to support the case of the petitioners, or the defence of the Defendant—so far the Court had jurisdiction to take it; as it would be absurd to confer on the Court the power of deciding, and yet withhold from it the power of doing so correctly.

The account taken is therefore evidence, so far as it goes to discharge the Defendants, but for no other purpose; as to any other, it not being necessary to a correct decision of the suit, the Legislature has not conferred the power of taking it. The decree pronounced in favor of the Defendants against the Complainants, must therefore be reversed, and the petition dismissed—the Defendants paying the cost of this Court, and the Petitioners all other costs.

PER CURIAM.—Decree reversed, and the petition dismissed.

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Newton Wood and Tabitha his wife, and Penelope E. Putney
v.
Daniel L. Barringer, executor of Henry Moring.
} From Wake.

A settlement made by an administrator, with commissioners appointed by an order of the County Court, is in no way binding upon the next of kin.

Where negroes were specifically bequeathed, and the share of one is set apart, and a profit is made by the administrator on another share belonging to an infant, this is no severance of the tenancy in common, and this profit may be recovered by the infant, in a joint bill for an account filed by all the legatees.

The bill which was filed in August, 1823, alleged that *Richard Putney* died in the year 1814, having made his will, whereby he devised his property equally, to his wife, the Plaintiff *Tabitha*, and his daughter, the Plaintiff *Penelope*. That upon the renunciation of the executors, administration with the will annexed, was committed to *Henry Moring*, who possessed himself of the personal property belonging to *Putney*, consisting of negroes and other chattles—all of which, except the slaves, he converted to his own use. That the negroes were hired out by the administrator for several years, "after which, he divided them according to the will." That the Defendants *Newton* and *Tabitha* had intermarried, and that the former had been appointed guardian to the Plaintiff *Penelope*, who was still an infant. That *Moring* was dead, having appointed the Defendant his executor, and prayed an account and payment of the legacies.

The Defendant by his answer, denied any appropriation of the estate by his testator, to his own use, and insisted that it had been properly administered. Further, that his testator in his lifetime, had made a settlement of his accounts as administrator, with three commissioners appointed by the County Court—that the Plaintiff *Wood*

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was present when that settlement was made, and attended to it on his own account, and as guardian for the Plaintiff *Penelope*, and submitted whether the Plaintiffs were not barred in this suit, by that settlement.

On the coming in of the answer, it was referred to the Master to take an account, without prejudice, to the matter of defence insisted on in the answer.

The Master reported a larger balance due the Plaintiffs than that ascertained by the account taken before the commissioners. That the negroes belonging to the estate were divided in December, 1818—that the administrator had hired out those belonging to the Plaintiff *Penelope*, during the year 1819, and had never accounted for the hire. The Defendant excepted to the report, because the Master "charged the Defendant with the hire of the negroes belonging to the Plaintiff *Penelope*, for the year 1819, when he ought to have rejected all evidence thereof, as it was not claimed in the bill, or included within its allegations." By consent, the cause was heard upon the defence set up in the answer, and also upon the exceptions.

Devereux, for the Defendant, contended,

1st. That the account taken under the order of the County Court was conclusive upon the Plaintiff, except in a bill pointing out errors in that account, and seeking to surcharge and falsify, (*Evertson* v. *Tappen*, 5 *Johns. Ch. Rep.* 511).

2d. That the hire of the negroes for the year 1819, appeared only in the proofs, and was not alleged in the pleadings. But on the contrary, was against a strong implication resulting from the bill, which charged only for hire received before the division—and that the Plaintiffs could only recover upon the *allegata et probata*.

3d. That the division made in the year 1818, was a severance of the tenany in common, and that the right

to the hire for the year 1819, being a separate right in the daughter, could not be asserted in a joint suit with the other Plaintiffs; regularly this is a cause of demurrer, but as the fact only appeared on the proofs, the Defendant should have all advantage thereof at the hearing, (*Harrison* v. *Hogg*, 2 *Ves. jr.* 323—*Attorney-General* v. *The Corporation Carmarthen*, *Cooper's Eq. Rep.* 30).

Badger & W. H. Haywood, for the Plaintiffs, as to the first point, was stopped by the Court—as to the second, they said the hire of 1819 was included in the bill, which was for an account, and this but one item thereof, and not a matter required to be specially stated.

They insisted that the division was not complete, until the Plaintiff *Penelope* came of full age and sanctioned it, and therefore the hire of 1819, was a joint right in the Plaintiff.

HENDERSON, Judge.—Whatever may be the character of the statement which the Defendant calls a settled account, it certainly is not such a statement or settlement, as precludes a bill for an account, and drives the Plaintiffs to a bill to surcharge and falsify. It may, and possibly should have some weight in taking the account, particularly where the person who stated it, as in the present case, is dead. It is not a stated account, because the adverse parties, had no compulsory process to compel the attendance of witnesses, or any right to controvert it. All that was conceded to them, was a mere matter of courtesy, including notice, for it appears that they were present; but whether they had notice in time to prepare for an investigation does not appear. The principal objection however is, that they were not parties, and therefore could not compel the attendance of witnesses. Nor does it appear that the account had been rendered to them before-hand, so as to enable them to inform themselves of its correctness.

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It is next objected, that the hire of the negroes for the year 1819, ought not to be included; first, because it is not within the charges in the bill: and secondly, if it is, it arose after the union of interests in the Plaintiffs had ceased.

As to the first point, I think it is within the charges of the bill. The bill calls for an account, until the division and delivery over of the slaves—for I must so understand it. The allotment of the negroes between the mother and daughter, was made at the close of the year 1818, and the first part allotted to the mother, delivered to her; the Defendant retained the daughter's share a year longer, as I understand the bill, in connection with the proofs; for it is not stated when that was delivered. The bill therefore contains a charge for 1819. As to the second point, viz. that the bill is multifarious, asserting a separate interest in the daughter (after the division) in a joint suit with the mother. This I think is incorrect in point of fact. They had a common interest before the close of the year 1818, which continued until the division was ratified by the daughter.

Notwithstanding the delivery to the mother, the mother and the daughter both retained their rights in the whole, until the daughter ratified the division; for the consideration that the mother surrendered her claim to those allotted to the daughter, was the ratification of the allotment made to the mother. So that in strictness, the property remained in common until the division became binding on both, as it could not bind one, unless it bound both.

The Defendant is liable to pay full hire for the year 1819, for his intestate, when rendering his account, failed to include it—and even under these circumstances, I think the hire very high. Yet as it is according to the evidence filed, and we have no data by which to correct it, and to reduce it, we must refer the matter again to

the Master, who with the same evidence would make the same report, it must be submitted to with reluctance. We would correct it; but the remedy might be worse than the disease.

PER CURIAM.—Let the exceptions be overruled and decree for the Plaintiffs.

Francis Taylor
v.
William Dickens & others } From Orange.

Upon opening the papers in this case, his honor Judge HALL observed, that it did not appear from them, that publication had been made, as to some of the persons named in the bill as defendants, although it had been frequently ordered; that replications had been filed to the answers of *Dickins* and *Langston*, but there was no order setting the cause down for hearing, without which it was premature, under the act of 1818, (*Revisal c.* 962, *s.* 5) to transfer it to this Court.

PER CURIAM.—Let the cause be remanded to the Court below, and let the party removing pay the costs of this Court.

Elijah Kimborough
v.
John Davis and Susan his wife, } From Wake.

An executory contract made in consideration of an intended marriage, whereby the parties covenant to make a provision for an illegitimate child of the wife, will, under the act of 1799, be protected in a Court of Equity—and its specific execution enforced, in favor of such child, against the husband.

The original bill charged, that the Defendant *Susan* was the mother of the Plaintiff, and that upon an agree-

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ment of marriage between her and the Defendant *John*, the Plaintiff being then an infant, it was agreed that a negro girl, and some other property, should be conveyed to the Plaintiff, on his arrival at full age—with an ulterior limitation, in case he should die without issue, to the children of the Defendants. That this agreement was made in consideration of the intended marriage, and that accordingly an executory contract was drawn up by the Defendant *John*, and signed by him and the Defendant *Susan*; whereupon the marriage took place. The bill then averred, that the Plaintiff had arrived at full age and prayed a specific execution of the contract.—Under an order obtained on the filing of the bill, the Defendants answered separately. From both answers it appeared, that the Plaintiff was the illegitimate child of the Defendant *Susan*, who, in her answer, admitted the agreement and its consideration as charged in the bill. The Defendant *John*, in his answer, denied that the agreement was made in consideration of an intended marriage, and insisted that the writing referred to in the bill, was made to please the Defendant *Susan*, who lived and cohabited with him before the marriage, and by whom he had several children, at a time when she was sick; and relied upon the fact, that the agreement was voluntary on his part, as a defence against the specific execution thereof.

Proofs were taken and read at the hearing, from which the Court inferred, that the agreement between the Defendants, was made in consideration of an intended marriage.

W. H. Haywood, for the Plaintiff.—This Court will execute the agreement for the *meritorious* consideration of providing for a child, otherwise left destitute. The English authorities are clear on this point, *if the child be legitimate*. And does that make any difference in North Carolina? It is contended that it does not—for by our

act of 1799, (*Revisal p.* 983) *natural* children are, under certain circumstances, made capable of deriving and transmitting an inheritance. A bastard is no longer reputed to be *filius nullius*, for he is directly made otherwise, so far as respects his *mother*. A provision that is bottomed on the clearest principles of equity, and would doubtless have been extended further, but for the well-grounded apprehension of introducing uncertainty into descents and distributions; for while it is easy to ascertain the mother, it is difficult, and in many cases impossible, to pronounce who is the father of a child. Let it be borne in mind, that this is an agreement to convey a part of the *mother's* estate to her son, and no part of the Defendant *Davis's* property, is sought to be taken from him.

Seawell, who appeared for the Defendants, was absent at the hearing of the cause, upon official duty, and therefore it was not argued for them.

TAYLOR, Chief-Justice.—The case is, that the Complainant is an illegitimate child of the Defendant's wife, and he alleges, that immediately before the intermarriage of the Defendant with his mother, it was agreed upon between them and in consideration of the marriage, that a slave and some chattel property belonging to his mother, should be settled upon him and given to him when he arrived at the age of twenty-one years, subject to certain limitations.

The promise to give the negro, is admitted by the Defendant *Davis* and wife, and that they executed a writing to that effect. The consideration of the promise is denied by *Davis*, and admitted by his wife; and the whole circumstances of the case render it probable that her agreement to marry him, was the motive that induced his compliance with her request, for though she had lived with him several years before, and had children by

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him, yet without a marriage, he had not a complete control over her property; and immediately after the writing was executed, the marriage took effect. The Defendant *Susan* had children by her former husband, all of whom were provided for, and the Defendant *Davis*, was in circumstances fully sufficient to provide for the issue he had by her. The Complainant was the only one of her children not provided for, and it was perfectly just and natural, that she should stipulate for some provision for him, before she finally surrendered her property to another husband.

If the paper signed had been executed with the formalities of a deed, and actually transferred the property, it would have been competent for this Court to give effect to it as between the parties, although it were voluntary, according to the distinction stated in *Ellison* v. *Ellison*, (6 *Vesey* 662), if you want the assistance of chancery to raise an interest by way of trust, on a covenant or executory agreement, you must have a valuable or meritorious consideration; for the Court will not constitute you *cestui que trust*, when you are a mere volunteer, and the claim rests in covenant as to transfer stock. But if the actual transfer be made, the equitable interest will be enforced; for the transfer constitutes the relation between trustee and *cestui que trust*, though voluntary and without consideration. There are cases too, where a voluntary bond has been supported by a decree, (1 *Vernon* 427—3 *P. Wms.* 222.) If the Complainant is considered as a volunteer, it may be doubted whether he can come into this Court, to raise a trust for his benefit; and although I believe there are no cases to be found extending the marriage consideration to illegitimate children, yet under the circumstances of this case, as influenced by the diversity of the law in this State from that of England, I think the Complainant ought to have relief.

The natural obligation of a parent to maintain his illegitimate offspring, cannot be doubted, (*Puffend*, 6, 4, c. 11, s. 6,) and the Defendant *Davis*, in this case, succeeded to the duties and obligations of his wife, by virtue of the agreement made before the marriage, and in consideration of his acquiring a right to her property. Bastards may take a gift from their parents, where they are sufficiently described, they may take by devise, if they have acquired a name by reputation. They are not considered as children for whom the consideration of blood would raise an use; yet on an estate, otherwise effectually passed, an use may as well be declared to a bastard being *in esse*, and sufficiently described, as to any other person. In those cases in which the conveyance being taken in the name of the child, is held an advancement for, and not a trust in the child, the principle is, that the parent was bound to provide for the child, and having directed the conveyance to be in his name, is presumed to have intended to discharge such moral duty. If such be the principle, it will follow, that wherever such obligation exists in the parent, the beneficial interest shall enure to the child. "The obligation does extend to an illegitimate child, and consequently I should conceive him to be within the principle, and entitled to the benefit," (2 *Fonb.* 129.) "Past seduction (says Chancellor *Kent*) has been held a valid consideration to support a covenant for pecuniary reparation; and the innocent offspring of criminal indulgence, has a claim to protection and support, which Courts of Equity cannot and do not disregard."

According to the law of England, bastards are incapable of being heirs. They are considered as the sons or children of nobody, and no inheritable blood flows to their veins, and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord. They can have no other heirs than the issue

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of their own bodies; for as they are considered the children of nobody, there can be no ancestors by whom a kindred or relation can be made. The reason of excluding them from the right of inheritance, is on account of the uncertainty of their ancestors. But our Legislature, wisely considering that this rule ought not to extend to cases where there is no uncertainty, as the mother of a bastard, has made them inheritable to their mothers, and to each other. (2 *Revisal*, c. 522.)

The law establishing the succession to intestates' estates, is founded on the presumed will of the deceased, that if he had made a provision in his lifetime, it would be such as the law prescribes—that he would have done that which is equally prompted by natural inclination and duty; and it is one of the first of duties, that we take due care for the maintenance of those whom nature teaches us to cherish with peculiar affection.

The law having thus rendered illegitimate children capable of inheriting to their mother, would be untrue to itself, were it to refuse an enforcement of the expressed will of the mother in her lifetime, in a case where the Complainant is the only one of her children unprovided for. I conclude, therefore, that here is a meritorious consideration, founded on the recognized relation, in which the Complainant stands to his mother and her husband, and that there ought to be a decree for him.

Per Curiam.—Decree according to the prayer of the bill, and give the Plaintiff his costs.

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v.
Elizabeth Yancy,
Mark Cooke and
Henry Cooke,
} From Wake.

A widow, who after the death of her husband occupies his residence, his children, some of them of age, living with her, is under no obligation to pay the taxes accruing thereon, between his death and the assignment of her dower.

Therefore, a purchase by her of the premises, for such taxes, made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's creditors.

THE ORIGINAL BILL, which was filed on the 3d of September, 1817, stated, that *Sterling Yancy* died intestate in January, 1815, seised of two lots in the city of Raleigh, on which he resided at the time of his death, leaving children his heirs of law, some of whom were of full age, and others infants, and the Defendant *Elizabeth*, his widow—that dower in the said lots was assigned to her, under which she entered, and became seised thereof as tenant in dower. That a judgment was obtained against the heirs of *Yancy* on a *scire facias* in a suit against his administrator, wherein the plea of *plene administravit* was found for the Defendant—that an execution on that judgment had been levied on the lots in question, and that the Plaintiff had purchased of the Sheriff, under that execution. That about the time of the Plaintiff's purchase, the taxes assessed by the Commissioners of the city of Raleigh, upon said lots, became due, and were suffered, by the Defendant *Elizabeth*, to remain unpaid. That the Defendant *Elizabeth* continued to occupy the lots after the death of *Sterling Yancy*, as well before, as after the assignment of dower. That by a private act of the General Assembly, passed in the year 1803, for the government of the city of Raleigh, it was enacted, "that every tenant, occupying a house, &c.

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within the said city, shall be liable to pay the tax herein laid upon such house, &c. and on failure of the proprietor of any lot to pay the annual tax thereon, by himself, tenant or agent, on or before the first of August in each and every year, the Commissioners of the said city are hereby authorised to sell the same at public vendue." That by a subsequent act, passed in the year 1806, it was enacted "that in all cases where the owner of any lot, &c. in the said city, or the occupants thereof, shall fail to pay the taxes, &c. the Commissioners of said city shall cause to be sold so much of said lot, as shall be sufficient to pay the taxes due thereon, and no more." The Plaintiff insisted that the Defendant *Elizabeth*, being an *occupant* of the said lots, was bound to pay the taxes thereof; but that instead of doing so, she had combined with the other Defendants to defraud the creditors of *Yancy*, and the Plaintiff in particular—and had not only neglected to pay the taxes, but had fraudulently procured the whole of the lots to be sold for the taxes due for the year 1815, and to be bought in by the Defendant *Henry Cooke*, who had conveyed them to her.

The bill prayed a discovery, and that the Defendants *Elizabeth* and *Henry* might be declared to be trustees for the Plaintiff, and that all deeds executed in furtherance of the fraudulent combination, might be delivered up to be cancelled.

The bill was taken *pro confesso*, as to *Henry H. Cooke*, who was examined as a witness, under an order to that effect.

The Defendant *Mark Cooke*, against whom no decree was prayed, in his answer, denied all knowledge of the matters set forth in the bill.

The Defendant *Elizabeth Yancy*, in her answer, denied the Plaintiff's title to be valid, but alleged that it was defective and void—a judgment against the heirs having been taken by default, some of whom were infants. She

admitted the death of her husband, as charged—and stated that her dower was assigned on the 23d of October, 1815, and that the sale for taxes took place on the 8th of November following; and insisted that the several acts of Assembly recited in the bill, imposed upon her no obligation to pay the taxes charged upon the lots.—She denied all fraud or combination, for the purpose of procuring a sale of the lots for the taxes, and averred, that she knew nothing of the sale or of the purchase by *Henry Cooke*, until after it was over, but admitted that *Henry Cooke* had received from her the amount he gave for the lots, and had assigned to her, and that she had obtained a deed from the commissioners, of which the Plaintiff had notice before his purchase, and she claimed to hold discharged of any trust for the Plaintiff, or any one else.

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This answer was fully supported by the testimony of *Henry H. Cooke*, and the other proofs taken in the cause, by which it appeared that the widow and children of *Yancy*, lived on the lots after his death and until the execution sale.

The private acts of the General Assembly for the government of the city of Raleigh, and the by-laws of that corporation, were filed as exhibits. By them it was proved, that the city taxes attached upon all the property within its limits, on the 1st of April in every year.

W. H. Haywood, for the Plaintiff, contended,

1st. That it was fraudulent for the Defendant *Mrs. Yancy*, to take an absolute deed for the two lots, when she was bound by law, as occupant, to pay the taxes.—And that being thus bound, her agreement with *Cooke*, amounted on his part to a surrender of his right, for the benefit of the proprietor.

2d. That if the acts of 1803 and 1806, did not impose upon her the burthen of paying the taxes as an occupant,

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still as tenant for life of one third, she ought to have paid that portion of the taxes, upon the same principle that compels the tenant for life to keep down the interest of an incumbrance, (*Lord Penrhyn* v. *Hughes*, 5 *Ves.* 99.)

3d. That the Plaintiff being a reversioner as to part, could not sue at law, and therefore was entitled to ask for a discovery and the relief prayed. For when his title at law accrues, his witnesses may be dead, and then he cannot have a discovery from the Defendant *Mrs. Yancy*, as his right to possession can only fall in after her death. (1 *Maddox* 185—2 *Haywood's Rep.* 226—1 *John. Ch. Rep.* 517—17 *Ves.* 112—1 *Ves. & Bea.* 244.)

Gaston & Badger, for the Defendants.

1st. The legal title was clearly divested by the sale to *Cooke*, and his purchase is not affected with fraud.—The Defendant's title is therefore good, for the reason that a sale by the purchaser without notice, to one having notice is so, the second purchaser being protected by the equity of his vendor.

2d. The Defendant was liable only for the taxes which accrued after the death of her husband, and then only for the part which was due in respect to her dowery, and the whole might have been sold for the taxes due upon the remaining two-thirds.

3. The judgment on which the execution issued, was not merely irregular and erroneous, but void. This position is fully supported by the case of *Bryan* v. *Brown*, decided in this Court (2 *Murph.* 343.) But if the judgment is void, nothing passed to the Plaintiff by the Sheriff's deed, and he has no interest in the subject matter of the suit.

HALL, Judge.—It is stated that *Sterling Yancy*, the owner of the lots in question, died about January, 1815, leaving his widow and children in possession thereof;

that judgment was obtained against his administrator, from which process issued against the lots in the hands of the heirs, and that the Complainant became the purchaser. That the lots were sold for taxes about the 8th of November, in the year 1815—that the deed for them was made by consent of the purchaser to the Defendant *Elizabeth*, and that the widow's dower was laid off between the Courts which sat in August and November.

It must be admitted that all the right the heirs at law of *Sterling Yancy* had in the lots in dispute, was acquired by the Plaintiff when he became the purchaser of them; it is therefore necessary to ascertain what that right was. Upon the death of *Sterling Yancy*, the title to the lots descended to his heirs at law, who, together with the widow, were in possession of them: they descended however to the heirs at law, subject to the widow's right of dower, but until dower was allotted to her the title to them was in the heirs. By the act of 1803, made for the government of the city of Raleigh, it was required that all taxable property should be given in on or before the first of April. By the same act, it is declared "that every tenant occupying a house or houses, lot or lots, shall be liable to pay the tax laid upon such house, &c. and on failure of the proprietor of any lot to pay the annual tax thereon, &c. on or before the first of August in every year, the commissioners of the city are authorised to sell the same, &c." The act of 1806, also made for the government of the city of Raleigh, declares "that in all cases, where the owner of any lot or the occupants thereof, shall fail to pay the taxes, so much of such lot as shall be sufficient to pay the taxes, shall be sold."

I think but little doubt can be entertained, that the heirs at law of *Sterling Yancy* were the tenants and proprietors of the lots, within the words and meaning of both these acts. It was their duty then, to give in

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their lots as taxable property, on the first of April, and to pay the taxes before the 1st of August in the same year. This however was not done, and the lots were afterwards sold, before the purchase made by the Complainant. At the time of his purchase, the heirs at law had no right to the property; it had been lost by the sale for the taxes. We are next to ascertain what remedy the Complainant has against the widow.

At common law the widow was entitled to her quarantine, and in the mean time to be supported by the heir, and before the expiration of her quarantine it was the duty of the heir to put her in possession of her dower. Our law makes provision for the widow's support for one year, and points out the mode by which she shall be put in possession of her dower. By these laws, the right of the heirs and the widow are not altered; perhaps the time of her quarantine is thereby enlarged. Before the widow has her dower allotted to her she is a mere occupant, she has no right or title to the land, or to one part of it in preference to another:—she has a right to dower in one-third part of it, but what third part that may be, depends upon the allotment of it, and when that is made, she claims, and is in under her husband. In the present case, the widow was not bound to give in the land for taxes, nor was she bound to give in one-third of it. It is true she was an occupant, but the heirs at law were occupants also, and the legal title was in them. When the land was sold for taxes, that sale divested the right of the heirs, and her claim to dower was swept off with it. The purchaser for the taxes had a preferable right to either of them, and for this the widow was not blameable; because if she was not bound either to enter the land for taxes, or to pay them, of course for not paying them she was in no fault—if she was in no fault, it is difficult to see how she committed one in taking a deed from the officer who sold them for the taxes, by the consent of *Cooke*,

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who bid them off. It is then upon that right she stands, and her dower right forms no part of it. It is not material when the Complainant purchased, whether he had notice of the sale to *Cooke* or not; he does not deny it, and she states in her answer, that he had notice.—The bill prays that she may be held as a trustee for the Complainant, and compelled to convey her title to him, because she fraudulently acquired that title. This I think is not established either by the law or the fact of the case. It will be understood that no opinion is given on the validity of her title; whatever it is, I am of opinion she should not be deprived of it by the decree of this Court. Neither is it intended to give any opinion on the Plaintiff's title at law, in case that of the Defendant was removed out of his way.

I am of opinion the bill should be dismissed.

TAYLOR, Chief-Justice, concurred in opinion with Judge HALL.

HENDERSON, Judge, *dissentiente....Mrs. Yancy* continued to occupy the house and lot on which her husband lived at the time of his death, which happened in January, together with her children, the heirs at law of her husband, some of whom were of full age, and some were infants. Her dower in one-third of the lot, was, on her petition to Wake County Court, assigned to her betwen the Courts in August and November. The city laws attached on the property (or occupiers) on the first day of April, and the tax became payable some time in the summer. The whole lot was sold in November for the taxes of that year, which were then unpaid, without her privity, or knowledge or contrivance, and *Cooke* became the purchaser for the amount of them, and communicated to *Mrs. Yancy* the benefit of his purchase, directing the City Commissioners to convey to her, which has been done. There has been no fraud, (as far as it appears) in any one.

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No communication took place between *Cooke* and *Mrs. Yancy*, either directly or indirectly. The purchase was made by him to save the property, and from motives of kindness to *Mrs. Yancy*. The only fault was in the omission to pay the taxes. *Branson*, who claims to be a purchaser at an execution sale against the heirs of *Yancy*, prays that this title thus derived from the sale for taxes, may not be set up against him. There is an objection to the validity of his purchase, the judgment against the heirs being taken at the first term, by default, some of them being infants.

I am inclined to believe that the prayer of the Plaintiff is reasonable. It was the duty of the occupant to keep down the incumbrance and any acquisition of title, made by her, growing out of her omission, is for the benefit of all concerned. In the adjustment of accounts, for instance, in this case, between *Mrs. Yancy* and the heirs, as to the rents and profits, from her husband's death to the assignment of dower, she could not set up any claim against them for more than two-thirds of the taxes paid by her, leaving one-third to fall on her dower right. If she has no such claim against the heirs, she has none against *Branson*, if he is substituted to them; which depends on the validity of his purchase. I think *Mrs. Yancy* continued the occupation until the assignment of dower, in consequence of her dower right. Had she occupied the lot through the mere curtesy of the heirs, together with them, or was she only exercising her quarantine right as a curtesy and a bounty of the law, the heirs could not have imposed the payment of the taxes on her as a duty; the gratuity must be made complete. The quarantine is allowed for a short time (forty days in England) that she may not be destitute of a home, before dower is assigned. I do not think that *Mrs. Yancy's* occupation on the first of April, was of that character—it was in consequence of her right to dower.

Nor do I believe that it is competent for her to object to the supposed defect in *Branson's* title. She purchased for the benefit of all concerned—thereby professing that her omission, however innocent, should injure no one. *Branson* is not a mere officious intermedler; he has at least an apparent title, and asks only a fair opportunity of asserting it in a Court of Law. As to two-thirds of the lots, that is, that part which was not, and could not be assigned as dower, I think that neither *Branson*, nor the heirs, have any cause of complaint; for as to that, she did not, and could not occupy it in consequence of her right of dower, or expectation of its assignment to her. I for a moment thought that the heirs should have been made parties—but no decree is prayed against them nor can I see how their rights are affected. It is with much deference to my brothers, that I express this opinion; but entertaining it, it is my duty to avow it. JUNE 1827.

PER CURIAM.—Let the bill be dismissed without costs.

IN THE SUPREME COURT.

June Term, A. D. 1827.

Regulæ Generales.

It is ordered, that hereafter the Causes on the Equity side of the Court shall, before the Causes on the Law side are taken up, be heard and disposed of: and that the Clerk keep separate Dockets of the Equity and Law Cases pending in this Court.

A true copy from the Minutes,

Teste, WM. ROBARDS, Clk.